UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Civil Action No. 5089

HOMER O. and Wife, DOROTHY CORRELL, - *Plaintiffs*

v.

UNITED STATES OF AMERICA - - - *Defendant*

For plaintiff:
Swafford, Jahn & Taylor
Ninth Floor, Maclellan Building
Chattanooga, Tennessee

For defendant:
J. H. Reddy

DOCKET ENTRIES

1964

Aug. 24 —Complaint filed.

Aug. 24 —Summons issued and handed to U. S. Marshal.

Aug. 25 —Summons returned executed as to the United States by serving copy on David E. Smith Asst. U. S. Attorney for the eastern District of Tennessee as Knoxville and mailed by certified mail three copies to the Attorney General, Washington, D. C. on August 24, 1964, and filed.

Oct. 16 —Answer of defendant, United States of America, filed. Copy served by Attorney.

Docket Entries

1965

Jan. 18 —Trial Brief of Defendant, filed. Copy served by Attorney.

Jan. 19 —Brief for the Plaintiffs filed. Copy served by attorney.

Jan. 20 —Discovery Deposition of Homer O. Correll & William C. Hale, filed. Notice to Attorneys by Clerk.

Jan. 21 —Order pursuant to Pre-Trial, filed. Copies to attorneys by Clerk.

Jan. 21 —Order amending Pre-Trial Order, entered in Civil Order Book 31, page 143, and filed. Copies to attorneys by Clerk.

Jan. 25 —Defendant's motion for directed verdict, filed. Copy served by attorney.

Jan. 25 —Plaintiffs' requested jury instructions No. 1 through No. 6, filed.

Jan. 25 —Order of trial to the jury: Plaintiffs' evidence heard, defendant rested without the introduction of any evidence, the defendant moved the Court for a directed verdict which motion was overruled, argument of counsel, charge of the Court, verdict in favor of the plaintiffs and against the defendant. Attorneys to prepare judgment in this case, entered in Civil Order Book 31, page 152, and filed.

Jan. 25 —Exhibits, filed.

Jan. 29 —Motion of defendant for Judgment notwithstanding the Verdict filed. Copy served by U. S. Attorney.

Feb. 9 —Order overruling defendant's motion for judgment notwithstanding the Verdict, entered in Civil Order Book 31, page 201, and filed. Copies to attorneys by Clerk.

1965

March 30—Agreed Judgment that plaintiff recover of defendant $93.20 for year 1960, plus deficiency interest of $17.24; and $97.85 for year 1961, plus interest of $12.23, together with interest on each amount at 6% per annum, entered in Civil Order Book 32, page 137, and filed.

Off the Docket

May 26 —Notice of Appeal filed. Copy served U. S. Attorney and by Clerk.

June 23 —Order extending time for filing record and docketing appeal entered in Civil Order Book 33, page 98, & filed. Copies to attorneys by Clerk.

Aug. 12 —Transcript of Testimony, filed.

Aug. 13 —Certified record on appeal mailed to Clerk, U. S. Court of Appeals, Cincinnati, Ohio.

Attest:
A true copy
Certified this Aug. 13, 1965
Karl D. Saulpaw, Jr., Clerk
By (s) Mary W. Johnson,
Deputy Clerk

[Caption Omitted]

COMPLAINT

Plaintiffs, Homer O. and wife, Dorothy Correll, of Fulton Road, Fountain City, Knox County, Tennessee, by and through their attorneys, Swafford, Jahn & Taylor, Ninth Floor, Maclellan Building, Chattanooga, Tennessee, present this, their complaint, against the United States of America pursuant to the provisions of Title 28, United States Code,

Section 1346(a)(1), and for cause of action allege as follows:

1. Plaintiff, Homer O. Correll, is employed by Hale Brothers, Inc. as a salesman and he and Plaintiff, Dorothy Correll live at Fountain City, Knox County, Tennessee, and have resided there during both of the calendar years 1960 and 1961, the years in question in this action.

2. This is a suit for the recovery of federal income tax (plus interest) erroneously and illegally collected from the Plaintiffs for the calendar years 1960 and 1961 in the following amounts:

Calendar Year	Taxes Claimed	Interest	Form 843 Exhibit No.	Total
1960	93.20	17.24	A	110.44
1961	97.85	12.23	B	110.08
Total	191.05	29.47		220.52

3. Plaintiffs, for the calendar years 1960 and 1961, filed a U. S. Individual Income Tax Return with the District Director of Internal Revenue at Nashvile, Tennessee.

4. That Homer O. Correll has been employed by Hale Brothers, Inc. over a period of several years as a salesman with assigned selling routes which regularly require his traveling away from the immediate vicinity of his home at Fountain City, Tennessee.

5. That in order for Mr. Correll to discharge his duties it was and is necessary for him to leave his home at very early hours in the morning. That these departures are made before his wife and family are awake and, therefore, of necessity, Mr. Correll must eat his morning meals at places on his routes.

6. That in the regular course of his business activities, Homer O. Correll incurred certain other expenses which are ordinary and necessary to his business and which together

with the meals eaten away from home (Paragraph 5 hereof) are reimbursed to him by his employer on an itemized accountable basis.

7. In the normal course of business the Defendant, by its duly authorized agents caused an examination of the Plaintiffs' U. S. Individual Income Tax Returns for the years 1960 and 1961. As a result of such examination the Defendant has made certain adjustments to the taxable income of said Plaintiffs which specific adjustments are as follows:

Item	1960	1961
Additional income from reimbursed expenses of employer.....	465.97	489.23

8. The Defendant has asserted that the amount of reimbursements made by Hale Brothers, Inc. to Plaintiff, Homer O. Correll, represents taxable income to him and that Plaintiff is not entitled to a business deduction for such expenses so incurred.

9. That as a direct result of the investigation of the Plaintiffs' U. S. Individual Income Tax Returns, additional taxes as set forth in Paragraph 2 above were assessed against and paid by the Plaintiffs under protest on May 20, 1964, the tax year 1960 having remained open for the assessment of tax under an agreement of the taxpayers with the Internal Revenue Service until June 30, 1965. Subsequently, the Plaintiffs filed a claim for refund (true copies of which are Forms 843 attached hereto as Exhibits A and B) for each of said years seeking a refund of such amounts. Said claims for refund were duly considered by the District Director of Internal Revenue, Nashville, Tennessee, and disallowed under date of June 19, 1964. The Plaintiffs received statutory notices of disallowance of claims by certified mail true and correct copies of said certi-

fied notices being attached hereto as Exhibits C and D. The aforesaid notices of disallowance or rejection were mailed to the Plaintiffs as required by Title 26, United States Code, Section 6532(a)(1).

10. Plaintiffs allege that the reimbursements in the amounts paid to Homer O. Correll during the years in question were reimbursements for ordinary and necessary business expenses incurred by Homer O. Correll or for the convenience of the employer and were reasonable in amounts. As such, the expenses would be deductible on his U. S. Individual Income Tax Returns in the same amount as the amount of the reimbursements thereby causing no adjustment to taxable income for either of the years in question, or would be excludable from gross income as expenses incurred by the employer for its convenience. Therefore, the additional income asserted by the Defendant is erroneous, is not according to law and such that such additional deductions should have been allowed under the Internal Revenue Code of 1954 as amended.

11. Plaintiffs are therefore entitled to recover from the United States of America the said sum of Two Hundred Twenty Dollars and Fifty-Two Cents ($220.52) plus interest as required by law and for such other and further relief as the court may deem proper. Plaintiffs demand a jury try this issue when joined.

(s) Homer O. Correll
(s) Dorothy Correll

(s) Carl A. Swafford
(s) Richard O. Jahn
(s) William L. Taylor, Jr.
Attorneys for Plaintiffs

Ninth Floor, Maclellan Building
Chattanooga Tennessee

Complaint

State of Tennessee }
County of Hamblen }

Homer O. Correll and Dorothy Correll, being first duly sworn, upon oath depose and say that they are the Plaintiffs named in the foregoing complaint subscribed by them, and that they have read the complaint, and that the statements contained therein are true to the best of their knowledge, information and belief.

Subscribed and sworn to before me this the 20th day of August, 1964.

My commission expires January 15, 1965.

(s) H. J. Reiland
Notary Public

EXHIBIT A

U. S. TREASURY DEPARTMENT—INTERNAL REVENUE SERVICE

FORM 843
(Rev. Mar. 1960)

CLAIM

To Be Filed With the District Director Where Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

☐ REFUND OF TAXES ILLEGALLY, ERRONEOUSLY, OR EXCESSIVELY COLLECTED.

☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.

☐ ABATEMENT OF TAX ASSESSED (not applicable to estate, gift, or income taxes).

District Director's Stamp
(Date received)

PLEASE TYPE OR PRINT PLAINLY

Name of taxpayer or purchaser of stamps Homer O. and Dorothy Correll

Number and street Fulton Road
City, town, postal zone, State Fountain City, Tennessee

Fill in applicable items—Attach letter size sheets if space is not sufficient.

1. Social security number 411-05-7605
3. District in which return (if any) was filed Nashville, Tennessee
5. Period—if for tax reported on annual basis, prepare separate form for each taxable year From January 1, 1960, To December 31, 1960.
6. Kind of tax Income Tax
7. Amount of assessment $110.44
   Dates of payment May 20, 1964
9. Amount to be refunded $110.44
11. The claimant believes that this claim should be allowed for the following reasons:

See Rider Attached

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated May 26, 1964

(s) Homer O. Correll
(s) Dorothy Correll

Complaint· Exhibit A

INSTRUCTIONS

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, enter social security and employer identification number, if any of both husband and wife and each must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

6. If claim is for excess social security (F.I.C.A.) tax witheld as a result of having had more than one employer, include the names and addresses of your employers, and the amount of wages received and taxes withheld by each as part of your explanation in item 11. Do not claim tax withheld if you have claimed the excess withholding on your individual income tax return.

Complaint Exhibit A

RIDER TO CLAIM FOR REFUND
Homer O. and Dorothy Correll
1960

Taxpayer, Homer O. Correll, is employed by Hale Brothers, Inc. as a salesman. In the performance of his duties, he is required to incur certain expenses in a travel status which are reimbursed to him on an accountable basis by his employer. These expenses are frequently not incurred by taxpayer while away from home over night but are ordinary and necessary business expenses to the carrying out of his business duties and are incurred for the convenience of the employer. As a result of such expenditures the District Director of Internal Revnue has caused an additional $465.97 in income to be taxed to taxpayers resulting in additional tax of $93.20 and interest of $17.24 for a total of $110.44. The District Director asserts such $465.97 to be personal expenses of taxpayer, Homer O. Correll, and not the reimbursement of business expenses.

The additional tax plus interest has been paid in full by taxpayers under protest. Consequently, a claim for refund is hereby made in the amount of $110.44, plus interest, or such other amounts as may be determined to be due by law.

EXHIBIT B

U. S. TREASURY DEPARTMENT—INTERNAL REVENUE SERVICE

FORM 843
(Rev. Mar. 1960)

CLAIM

To Be Filed With the District Director Where Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

- ☐ REFUND OF TAXES ILLEGALLY, ERRONEOUSLY, OR EXCESSIVELY COLLECTED.
- ☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
- ☐ ABATEMENT OF TAX ASSESSED (not applicable to estate, gift, or income taxes).

District Director's Stamp
(Date received)

PLEASE TYPE OR PRINT PLAINLY

Name of taxpayer or purchaser of stamps Homer O. and Dorothy Correll

Number and street Fulton Road
City, town, postal zone, State Fountain City, Tennessee

Fill in applicable items—Attach letter size sheets if space is not sufficient.

1. Social security number 411-05-7605
3. District in which return (if any) was filed Nashville, Tennessee
5. Period—if for tax reported on annual basis, prepare separate form for each taxable year From January 1, 1961, To December 31, 1961
6. Kind of tax Income Tax
7. Amount of assessment $110.08
   Dates of payment May 20, 1964
9. Amount to be refunded $110.08
11. The claimant believes that this claim should be allowed for the following reasons:

See Rider Attached

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated May 26, 1964

(s) Homer O. Correll
(s) Dorothy Correll

Complaint Exhibit B

INSTRUCTIONS

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, enter social security and employer identification number, if any of both husband and wife and each must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

6. If claim is for excess social security (F.I.C.A.) tax witheld as a result of having had more than one employer, include the names and addresses of your employers, and the amount of wages received and taxes withheld by each as part of your explanation in item 11. Do not claim tax withheld if you have claimed the excess withholding on your individual income tax return.

Complaint Exhibit B

RIDER TO CLAIM FOR REFUND
Homer O. and Dorothy Correll
1961

Taxpayer, Homer O. Correll, is employed by Hale Brothers, Inc. as a salesman. In the performance of his duties, he is required to incur certain expenses in a travel status which are reimbursed to him on an accountable basis by his employer. These expenses are frequently not incurred by taxpayer while away from home over night but are ordinary and necessary business expenses to the carrying out of his business duties and are incurred for the convenience of the employer. As a result of such expenditures the District Director of Internal Revnue has caused an additional $489.23 in income to be taxed to taxpayers resulting in additional tax of $97.85 and interest of $12.23 for a total of $110.08. The District Director asserts such $489.23 to be personal expenses of taxpayer, Homer O. Correll, and not the reimbursement of business expenses.

The additional tax plus interest has been paid in full by taxpayers under protest. Consequently, a claim for refund is hereby made in the amount of $110.08, plus interest, or such other amounts as may be determined to be due by law.

EXHIBIT C

FORM L-60 (4-59)

U. S. TREASURY DEPARTMENT
Internal Revenue Service
District Director
Nashville, Tennessee

June 19, 1964

In Reply Refer To
2310

Certified Mail
Homer O. and Dorothy Correll
Fulton Road
Fountain City, Tennessee

In Re: Claim for Refund of
$110.44

For the Period
1960

Dear Mr. and Mrs. Correll:

In accordance with the provisions of existing internal revenue laws, this notice of disallowance in full of your claim or claims is hereby given.

No suit or proceeding in any court for the recovery of any internal revenue tax, penalty, or other sum which is a part of the claim for which this notice of disallowance is issued, may be begun after the expiration of two years from the date of mailing of this letter.

Very truly yours,

(s) James A. O'Hara
District Director

EXHIBIT D

FORM L-60 (4-59)

U. S. TREASURY DEPARTMENT
Internal Revenue Service
District Director
Nashville, Tennessee
June 19, 1964

In Reply Refer To
2310

Certified Mail
Homer O. and Dorothy Correll
Fulton Road
Fountain City, Tennessee

In Re: Claim for Refund of
$110.08

For the Period
1961

Dear Mr. and Mrs. Correll:

In accordance with the provisions of existing internal revenue laws, this notice of disallowance in full of your claim or claims is hereby given.

No suit or proceeding in any court for the recovery of any internal revenue tax, penalty, or other sum which is a part of the claim for which this notice of disallowance is issued, may be begun after the expiration of two years from the date of mailing of this letter.

Very truly yours,

(s) James A. O'Hara
District Director

[Caption Omitted]

ANSWER

The defendant, United States of America, by its attorney, John H. Reddy, United States Attorney for the Eastern District of Tennessee, for his answer to the complaint herein alleges as follows:

1. Admits the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2, except denies any taxes were erroneously or illegally collected by defendant.

3. Admits the allegations contained in paragraph 3.

4. Admits the allegations contained in paragraph 4.

5. Defendant is presently without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph 5.

6. Admits the allegations in paragraph 6 that the plaintiff was reimbursed by his employer for certain expenses, but defendant is presently without knowledge or information sufficient to enable it to form a belief as to the truth of any further allegations contained in paragraph 6.

7. Admits the allegations contained in paragraph 7.

8. Admits the allegations contained in paragraph 8.

9. Admits the allegations contained in paragraph 9, except alleges that the taxes were paid by plaintiff on May 25, 1964.

10. Denies the allegations contained in paragraph 10.

11. Denies the allegations contained in paragraph 11, except admits plaintiffs are entitled to a jury to try this issue.

Wherefore, the defendant prays that the complaint be dismissed with prejudice and that the defendant be allowed his costs and disbursements.

_____

United States Attorney

CERTIFICATE OF SERVICE

It Is Hereby Certified that service of the foregoing answer has this ____ day of October, 1964, been made on counsel for plaintiffs by depositing a copy thereof postage prepaid, in the United States mail addressed to Swafford, Jahn & Taylor, Ninth Floor, Maclellan Building, Chattanooga, Tennessee.

_____

United States Attorney

[Caption Omitted]

ORDER PURSUANT TO PRE-TRIAL

It is agreed by counsel for the parties and ordered by the Court that this statement will be binding at trial of the case on its merits;

Nature of Action:

Jurisdictional statute, Title 28 U.S.C. Sec. 1346(a)(1). Refund of Federal Income Tax under Title 26 U.S.C. Secs. 119 and 1962.

Theories Upon Which Plaintiffs Expect to Recover:

Plaintiff is a salesman for Hale Brothers Produce Company of Morristown, Tennessee, leaving his home early in the morning and going on his route which takes him some 150 to 200 miles per day away from his home. He eats breakfast after he leaves home before he begins his route, eats lunch on the road and returns to his home every evening, submits the orders to his employer for delivery the next day. He incurs traveling expenses in the course of his work.

Plaintiff says he is entitled to deduct traveling expenses under Section 119, Internal Revenue Code, Title 26, or

Section 162, even though he does not spend overnight away from home.

Plaintiff says that the Hanson case, 298 F. 2d 381 (C. A. 8) is the controlling factor.

Plaintiff says that the Commission has made an arbitrary classification or line of distinction that requires the person to stay away from home during a period of rest or overnight before these expenses of meals are deductible. Plaintiff says these are deductible expenses incurred for the convenience of the employer under Section 119 or ordinary necessary business expenses under Section 162.

Theories Upon Which Defendant Expects to Defeat Recovery:

Government contends that these meal deductions should be included in income, and says that under Section 119 there shall be excluded from gross income the value of any meals and lodgings furnished by an employer on the premises of the employer. Government says this has not been done and that it has not been furnished for the convenience of the employer. Further, they have to be meals in kind rather than money paid to the taxpayer to buy the particular means. Government says these are personal expenses and do not come under Section 162(a)(2) because this is actually traveling away from home that the taxpayer is doing and Section 162 would be the only statute under which this could be deducted from his income. (Magness v. Commissioner, 247 F. 2d 740; Syslope v. Commissioner, 21 Tax Court 131; Charles N. Anderson v. Commissioner, 42 Tax Court 410.)

Issues:

(1) Are these ordinary and necessary business expenses within the definition of Section 162?

(2) Are these expenses incurred by him for the convenience of the employer and thereby reimbursed and not taxable to him?

(3) Whether the means in question are furnished on the business premises of the employer, and if not, whether they would come within Section 119 and if they were not furnished in kind whether Section 119 would be applicable.

Note: Regulations relied on by the Government to be furnished and attached to the pre-trial order.

Note: Parties to file trial briefs on or before January 18, 1965, attaching to the brief suggested charges on the applicable law.

Stipulations:

(1) Parties to exchange names and addresses of witnesses on or before January 18, 1965.

(2) The amounts involved will be stipulated or computed by the parties and neither the Court nor the jury will be concerned about the amount involved.

(3) Counsel for plaintiff to furnish breakdown of the amounts as between lunch and dinner meals.

The parties shall have until trial date within which to except to any part of this order.

Approved for docketing and filing:

_____

United States District Judge

[Caption Omitted]

DEFENDANT'S MOTION FOR DIRECTED VERDICT

The defendant respectfully moves the Court to direct the entry of a verdict in its favor and, as grounds therefor, assigns the following:

Motion for Directed Verdict

1. On the evidence before the Court, the plaintiff, Homer O. Correll, has failed to prove that the meal expenses he incurred were not of a personal nature, as defined by Section 262 of the Internal Revenue Code of 1954.

2. On the evidence before the Court, the plaintiff has failed to prove that his means were furnished to him for the convenience of his employer.

3. The evidence is without dispute that the meals were not furnished to plaintiff on the premises of his employer.

4. The evidence is without dispute that the meals were not furnished in kind to the plaintiff.

5. On the evidence before the Court, the plaintiff has failed to show that he was "away from home," as the term is used in Section 162(a)(2) of the Internal Revenue Code of 1954.

6. Under the evidence in this case, the defendant is entitled to a judgment as a matter of law.

(s) William D. M. Holmes
Attorney
Department of Justice
Washington, D. C. 20530

[Caption Omitted]

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The defendant respectfully moves the Court to set aside the verdict of the jury, which was returned on January 25, 1965, and to enter judgment in its favor notwithstanding the verdict and, as grounds therefor, assigns the following:

(1) The verdict is contrary to the evidence adduced at the trial.

(2) The defendant is entitled to a judgment in accordance with its Motion For Directed Verdict, which was filed at the conclusion of the evidence.

Motion for Judgment Notwithstanding the Verdict

(3) The evidence of record shows, without dispute, that plaintiff Homer O. Correll was not "away from home" within the meaning of that term as it is used in Section 162(a)(2) of the Internal Revenue Code of 1954.

In support of this motion, the defendant hereby adopts all arguments which were presented upon the trial of this action and the brief which was submitted to the Court prior to the trial.

John H. Reddy
United States Attorney

By:_____
Assistant United States
Attorney

[Caption Omitted]

ORDER

The Government has moved to set aside the verdict of the jury and to enter a judgment in its favor notwithstanding the verdict upon three grounds, the first of which asserts that the verdict is contrary to the evidence. It is the opinion of the Court that this ground is without merit and is, therefore, overruled.

It is asserted in the second ground that defendant is entitled to a judgment in accordance with its motion for a directed verdict. The Court was of the opinion at the time that it passed on the motion and is still of the opinion that the evidence presented issues of fact for the determination of the jury and there is substantial evidence to support the verdict of the jury.

Ground No. 3 states that plaintiff was not "away from home" within the meaning of that term as used in Section 162(a)(2) of the Internal Revenue Code of 1954. In the opinion of the Court, this ground is lacking in merit and

is overruled. Reference is made to the cases cited by the Court at the time the motion was overruled during the trial.

Enter:

(s) Robt. L. Taylor
United States District Judge

[Caption Omitted]

JUDGMENT

This cause having come on for hearing on January 25, 1965, with a jury to try the facts, and the jury having reached a verdict for the Plaintiff it is, in conformity with the jury findings:

Ordered And Adjudged, that the plaintiff in Civil Action No. 5089 has judgment against defendant for the year 1960 in the principal amount of Ninety-three Dollars and Twenty Cents ($93.20) plus deficiency interest of Seventeen Dollars and Twenty-fourt Cents ($17.24); for the year 1961 in the principal amount of Ninety-seven Dollars and Eighty-five Cents ($97.85) plus deficiency interest of Twelve Dollars and Twenty-three cents ($12.23) together with interest on each of the aforesaid amounts at the rate of six per cent (6%) per annum according to law.

Approved For Entry:

(s) Robt. L. Taylor
United States District Judge

Presented and approved by:

(s) William L. Taylor, Jr.
Attorney for Plaintiff

Approved as to form by:

J. H. Reddy
United States Attorney

By: (s) G. Wilson Horde
Assistant U. S. Attorney

[Caption Omitted]

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Judgment entered against it in this cause on March 30, 1965.

J. H. Reddy
United States Attorney
By: (s) G. Wilson Horde
Assistant U. S. Attorney

CERTIFICATE OF SERVICE

I, G. Wilson Horde, Assistant United States Attorney for the Eastern District of Tennessee, and as such one of counsel for the defendant in the above-entitled case, hereby certify that on the 26th day of May, 1965, I served a copy of the foregoing Notice of Appeal upon William L. Taylor, Jr., Esquire, Ninth Floor, Maclellan Building, Chattanooga, Tennessee, counsel for plaintiff, by depositing same in the United States mail and addressed to him as above.

(s) G. Wilson Horde
Assistant U. S. Attorney

[Caption Omitted]

[Tr. 2]

APPEARANCES:

For the Plaintiffs:

William L. Taylor, Jr., Esq.
Carl A. Swafford, Esq.
Chattanooga, Tennessee

For the Defendant:

G. Wilson Horde, Esq.
Assistant United States Attorney
Knoxville, Tennessee

William D. M. Holmes, Esq.
H. M. Doster, Esq.
Tax Division
Department of Justice
Washington, D. C.

This cause came on to be heard before the Honorable Robert L. Taylor, Judge, United States District Court, Eastern District of Tennessee, Northern Division, on Monday January 25, 1965, and a jury, when the following proceedings were had:

* * * * * * *

[Tr. 9]

W. C. HALE, called as a witness by and on behalf of the plaintiffs, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Taylor:

Q. Would you state your name and address, please?

Testimony of W. C. Hale

A. W. C. Hale, 534 West Second North Street, Morristown, Tennessee.

Q. What is your employment, Mr. Hale?

A. I am the president of Hale Brothers, Incorporated, which is a corporation dealing in the distribution of fruits and vegetables and also institutional canned goods and frozen foods.

Q. Where is this business located?

A. Morristown, Tennessee.

Q. Are you a party to the lawsuit?

A. No.

Q. Mr. Hale, would you briefly describe some of the positions which you have filled with the company?

A. Well, originally, we were a simple partnership up until probably some four or five years ago. At that time I was a partner in the business, and at the establishment of the business, of course, it was very small and our brother did the inside work and I did the outside work.

[Tr. 10]

I was on the road as a salesman just as Mr. Correll is now.

Q. How many years traveling did you perform?

A. Oh, I guess I worked at it around, exclusively, possibly for 15 years, and then as the business grew I spent less time on the road but I continued to spend some time even until my brother's death which occurred in June, 1960. Since then I can't get out at all, of course.

Q. How long has Hale Brothers been in business?

A. Since 1925.

Q. Always the same line?

A. Well, we have added the institutional lines of canned goods and frozen foods, since that time, rather recently.

* * * * * * *

[Tr. 11]

The Witness: You want me to identify that?

By Mr. Taylor:

Q. Yes.

A. This is an invoice envelope in which we place invoices for the merchandise delivered on our trucks.

Q. What appears on the back of that?

A. On the back of it is a map of our territory.

Q. Territory. What do you mean by "territory"?

A. That is the area that our salesmen cover in selling merchandise and the area we serve with delivery.

Q. Hale Brothers?

A. Hale Brothers, that is right.

Q. In accordance with the map that is on the back of that envelope, could you briefly describe the area that Hale Brothers cover?

[Tr. 12]

A. Well, I will start here on the north, we go as far as Manchester and London, Kentucky; come on around and we catch Williamsburg, Kentucky, and Jellico, LaFollette, on to Clinton, out to Oak Ridge, Harriman, Rockwood, and we drop over and work Athens and points in between, you might say, Etowah and points in between; of course Knoxville and this immediate area.

We go as far as Gatlinburg in that direction. And when you start east and northeast, I see it is bounded by Erwin, Johnson City, Elizabethton, Bristol, and we do go to Abington some but not regularly, and we go up in Virginia there as far as Wise and Coburn is the farthest point.

About 135 miles, you might say, we work.

Q. Are those envelopes widely circulated to the public and customers?

A. Practically every invoice that goes out is in one of these envelopes.

Testimony of W. C. Hale

Mr. Taylor: I would like to move it be introduced as Exhibit No. 2.

The Court: Granted. * * *

* * * * * * *

[Tr. 13]

By Mr. Taylor:

Q. In the course of your business how does the company sell its merchandise?

A. Well, we have salesmen who go out and solicit orders and take orders, and at the end of the day they bring these orders in, either bring them in or one way or another get them in, and the orders are immediately taken by the night crew and processed—I can got into detail if you want me to.

Q. If we may, let's stop right there for the moment. How many salesmen does the company employ or did they employ in 1960 and 1961?

A. Well, I don't know that my memory is good. We employ 18 now. There wouldn't be much difference in the number at that time. There could have been a couple less. I am not sure.

Q. What is the company arrangement as far as a salesman's compensation is concerned?

A. We pay them a salary and expenses.

Q. Do you have a contract agreement with them?

A. No, it is oral.

[Tr. 14]

Q. You mentioned the point of expenses. Would you go into that a little more elaborately and tell us what type expenses the salesmen incur?

A. Well, of course, we furnish an automobile and all the costs that go with that, and the type expenses you mean, I assume, are the kind he pays out on the route. That would be his meals, meals for customers, which naturally

you do some; gasoline when he buys it on the road; any other incidental expenses he might incur.

That is all done on an audited basis. There is no fixed amount, no set amount, no round figure. It is actually what he spends, he puts it down just exactly what he spends.

And do you want me to explain how it is paid back to him or not?

Q. Yes, if you would. I was just going to ask that question.

A. He turns in—

Q. What do you mean—define what you mean by audit. You used the term "audited basis." Would you explain to the jury what that is?

A. What I mean, audited basis, is their actual expense, no guesswork to it. If he pays 65¢ for his breakfast he puts 65¢ down; if he pay $1.25, he puts that down. If he puts down more than that and we found it out, he would

[Tr. 15]

not work for us.

At the end of the week he turns in the expense, the bookkeeper—I don't see them, I used to, I don't now, the office manager scrutinizes them and he is given this same money back. The same money he started out with and he spent, he is given that back, not one penny more and he should not receive one penny less.

Q. You mentioned there the point of reimbursement of expenses for meals. What meals are there, that is, that your salesmen might incur?

A. Well, whatever is necessary, all of them, eat breakfast, of course, they get out in the business area early. It is necessary and we require that they eat breakfast at certain places, and I don't want them changing their place of eating unless they tell me, because the nature of that business is, you do it in the morning, which I do very early

while the rest of you are still in bed, probably, but we have our inventories and our stock and we may want to promote some particular item, and I want to know where I can call these people?

Q. First thing in the morning?

A. First thing in the morning. In one instance, on a certain morning, we have, I believe, four or five men that always eat at the same place because that saves maybe four or five phone calls on my time. And then at lunch, of

[Tr. 16]

course, we furnish that because obviously a man working anywhere from 40 to 100 miles away from home can't come home at lunch, and also we want them to eat at a regular place.

We require that they eat at a regularly stated place so I'll know where to call and I can get in touch with them. We leave it up to these boys. Also, if a man is out and if his car broke down and he did not get in until nine o'clock at night, we do expect him to eat supper and if he did we would expect to pay for it.

We have some cases where they have finished rather late. Myself, I used to work Knoxville all the time, and I didn't get out of here Saturday nights until about eleven o'clock and I had to eat supper. I think anybody would understand that.

These boys, when they work late they eat their dinner and we pay for it.

Q. As far as these salesmen's routes are concerned, are any of the salesmen on routes where they are required to be out overnight?

A. Yes. Mr. Correll—well, not back at that time, but I assume we do have some men that spend one night a week out.

Q. But generally they return home every day?

A. Generally they do, practically always. There are not many territories that you can work in and not return

[Tr. 17]

every night.

You take some of your territories, like Kentucky, where a man don't have the buying opportunities that they do in Knoxville where, for instance, you can solicit orders on Tuesday and they will defer delivery on the order until Thursday.

You come down here in Knoxville and want to sell a man something Tuesday and if he doesn't get it until Thursday, he will say that he can get it delivered quicker, but in the remote territories you can work it Tuesday and Wednesday and then deliver a couple of days later, and in that case they may spend the night out and it is delivered, for instance, a day later.

Q. You mentioned your delivery there. What is the company procedure in how a customer's order is filled, and give us the background on that.

A. I will. We use an ordinary pad order blank which has three copies. The white copy is the first copy, the yellow copy is the second copy and a third pink copy. These boys write these orders up. At the same time they write them up they make an invoice and also the delivery sheet, and just as soon as the orders come in the night crew grabs them and they grab the first ones and pull the pink copies out.

Then one man takes them and he works the re-

[Tr. 18]

cap sheets, extends the items like, well, maybe he has a certain number of 50 pound potatoes. He makes the recap of those and takes them out and they start getting the order up.

While they are getting the orders up, some of the other men that do this work, they figure the tickets, extend them.

We never let a salesman, of course, extend a ticket. Then while they are extending them they are loaded on the trucks, and we try to get these things up by 4:30 but we can't always do it every night.

Q. Referring to the orders that he takes, a hypothetical illustration, say Monday, the orders that are taken on Monday, when are they delivered?

A. They are delivered on Tuesday.

Q. In your procedure what time are they filled, in your business?

A. Well, as soon as the salesman gets them in.

Q. On Monday evening?

A. On Monday evening, that is right. What you try to do, you try to load your long runs first because you got to get away early. If you take a truck from Morristown to Manchester, if you did not get him away early you would not deliver it the day after.

Q. Why is it company policy to fill these orders at night?

A. Well, that is what we really built our business

[Tr. 19]

on. We are in a small town and built this business this way, and it is the only way. We have got to do a better job than the other fellow and that is service.

Q. Does this have an effect on the salesman?

A. It certainly does.

Q. In what respect?

A. Well, I don't know whether I understand the question or not.

Q. Does the filling of the orders that come in each night?

A. What is—

Q. The filling of these orders that you referred to.

A. There is no other way to get the order in than for him to bring them in. That is his job. If you did not have

a salesman on the road, even if you were soliciting business by telephone, you have a right to put a salesman on the road, but you don't know whether you would get a partial load or a full load and you push them and try to bring the weights up to get a load possible to the company.

Q. Referring to the salesmen, do they have particular territories?

A. They do.

Q. Are they assigned to them?

A. They are.

* * * * * * *

[Tr. 20]

Q. Assuming, of course, you have an established business at the present time and established territories, how would you put a new salesman into a territory at this time?

A. Well, you are talking about—I don't know whether you are talking about an emergency where a man might break his leg or break his arm and you have to have someone work it for him.

Q. Assume it is permanent, a new man?

A. Assuming the man you had quit, something happened or you just discharged him, which is something we never do, seldom ever, you had your route sheet. Each one of these boys has a route sheet of the territory. It has each day for your first customer and where he would be at intervals during the day and the time that he is at a certain place.

[Tr. 21]

That is for the convenience of the company so that this man who might take his place knows where he is and he has the route sheet to go by, each salesman does of his complete territory at all times.

Q. What do you do with these route sheets, Mr. Hale?

A. What is that?

Testimony of W. C. Hale

Q. What do you or does the company, the home office do, with these route sheets?

A. These route sheets, we may have to call—he keeps the territory or route sheet in his drawer all the time. I have to have it. I have what I call a salesman's route book, and for each salesman on every day we have got the route of the customers he works beginning in the morning on through.

Q. Mr. Hale, I have just handed you some sheets of paper. Would you identify those for me?

A. It is Homer Correll's work list at the present time on Mondays, and we have—

Q. Would you describe that item at this time?

A. The first thing I see here is Atkins Grill in Sweetwater. They eat breakfast there all the time. They eat there because, one reason, he is a good customer, and another reason that I have got to know where they are.

If they want to change these points of eating,

[Tr. 22]

it is all right, but they have got to let me know where they will be. There is another man in that territory and they both eat there and I can always call them at 6:30 in the morning there and give them any information I want to give them.

* * * * * * *

[Tr. 23]

Q. Referring to Exhibit No. 1, I believe it is plaintiffs' Exhibit No. 1, Mr. Hale, those are copies of the book pages which you maintain?

A. That is right.

Q. If it required you contact Mr. Correll at a particular time on a particular day, what benefit would this sheet serve?

A. Well, it would be impossible for me to get in touch

with any of the boys during the day if you did not have these routes sheets here with you at the time.

If you will note, the jury will note over here, we have got the approximate time at each place and they are not off of this time hardly at all.

When I worked on the road I know I did not miss my schedule—tried not to miss is over five to ten

[Tr. 24]

minutes. There are many reasons for that.

Q. What is it necessary for them to follow such a rigid time schedule?

A. Well, the reason is that there are times that you want to call on people in the trade. They may expect them at that time. If they don't keep his schedule, the first thing you know it is going to be noon and you haven't got half of your morning's work done, and there are times that it is best to call on particular customers.

You will note that they have the phone numbers down here also.

Mr. Taylor: Without identification, we would like to introduce that into evidence.

The Court: Received:

(Exhibit No. 1 was filed.)

Mr. Taylor: And could we have that circulated to the jury.

The Court: Please give that to the jury, Mr. Marshal.

(Exhibit was passed among the jury.)

By Mr. Taylor:

Q. Mr. Hale, I am not sure that you made this point clear. You, I believe, testified concerning the breakfast meal. Now referring to lunch, does this schedule pin down the salesmen as to where they have lunch?

[Tr. 25]

A. Pretty well, yes. As I say, if they want to change

their place of eating their meal, why they can but they have got to do it by arrangements made beforehand. I have got to know where they are. The produce business is not like a lot of businesses. It is fast. You have got to do what you do and you have got to be informed and you have to keep your men informed.

Q. Would you elaborate a little bit more on that point, why is it in your particular business, why is it such a necessity to contact these salesmen as quickly as possible?

A. Well, you take for instance last week, we were bringing in a certain size lettuce. You have two sizes. Two dozen size and two and a half dozen size, a certain number of two and a half.

Q. Would you speak up a little bit. I am not sure these gentlemen can hear you?

A. I say, you take lettuce, for instance, last week. There are two sizes of lettuce. Two dozen and two and a half dozen. We bring in a certain number of two and a half dozen lettuce which they can feature in their advertisement and sell some cheaper, and normally the two dozen is a popular size. That is, you sell more of it. I have got to make sure that the trade will use it, and if you have two and a half dozen that you can sell for a dime, the man might sell it, you can let him advertise it and you

have to be sure you have it for him, and if you order 65 cartons of two and a half lettuce you can't guarantee that you are going to sell that much. So we come down on Thursday morning, I have still got Friday left for delivery and Saturday, and we come down and we take inventory and I see that we still have some two and a half dozen lettuce on hand and we have got to get rid of it, get rid of some of this two and a half dozen lettuce because you have the weekend coming up, and we can call them and maybe

cut the price on it some to get rid of it. That is just a good illustration.

That happens in many ways. If you are buying, we are handling from 2,400 to 3,000 cartons of lettuce a week and you have got to know what you are doing to keep up with it.

* * * * * * *

[Tr. 27]

Cross-examination

By Mr. Holmes:

Q. Mr. Hale, all of these questions that I will be asking you, of course, I will be asking for the years in suit rather than at the present time.

A. Yes.

[Tr. 28]

Q. Approximately how many salesmen did you have in the company in 1960 and 1961?

A. As I said, we have eighteen now. I don't remember whether we have—the number does change but very little in that length of time. I would say 16 to 18. We probably had 18 back at that time, I wouldn't say.

I am under oath, you know. I got to be pretty careful.

Q. All right, fine, and you paid them a salary and you pay their expenses; is that right?

A. Yes, sir.

Q. Now you also pay their meal expenses?

A. What is that?

Q. You also pay their meal expenses.

A. That last word you are using—

Q. You also pay their meal expenses.

A. Oh, yes, meal. Yes, we do.

Q. Where did Mr. O. M. Cole, where does he live?

A. Mr. Cole lived in Morristown.

Q. In Morristown?

[Tr. 29]

A. Yes.

Q. They have various areas that they work?

A. Yes, sir.

Q. Various territories, I assume?

A. Yes.

Q. Do any of them work in Morristown?

A. Not exclusively, no.

Q. But do they work, say, one day, two days?

A. You know we got to work the Town of Morristown.

Q. All right. How many people work in the Town of Morristown?

A. We have two men that work there partial time.

Q. And they live in Morristown?

A. One of them lives over at Beane Station. Of course, that is twelve miles away, it is a long way, and that costs to spend the night out.

Q. Now do you have any men that work in Knoxville?

A. I beg your pardon?

Q. Do you have any men that work in Knoxville?

A. Yes, sir, we do.

Q. Where do they live?

A. One of them lives here, one lives in Morristown.

[Tr. 30]

Q. I see. Now the man that works in Knoxville, does he work Knoxville exclusively or does he work in Knoxville just two or three days and then some place else?

A. One of the men in Knoxville works in Knoxville exclusively and one works in Knoxville and works Maryville two partial days a week.

Q. You pay the meal expense for all salesmen; is that right?

A. Meals?

Q. Meal expense.

A. Yes, we do. We do not pay the expenses when they are off. We don't pay their expenses on Friday or Tuesday, if that is their day off, or Sunday.

Q. Now did you pay the meal expense for the man when he works in Morristown who lives in Morristown while he is working in Morristown?

A. I assume he put it on his expenses. He certainly should.

Q. In other words, this man works in the vicinity of Morristown, he makes his route in Morristown and he lives there, yet you pay meal expense for him?

A. I assume he puts them all in. He should, because his time is restricted when he sees a customer. If he doesn't see him at the right time he may the first time or two but no more. He goes out to American Enka Corporation

[Tr. 31]

and gets an order except he eats breakfast before that, I believe he does.

Q. And he stops at the place of his choice and eats breakfast.

A. He stops at the place I use. We have two more men there. They give us quite a bit of business there. If he did not use it I would speak to him.

Q. And the man who lives in Knoxville and your Knoxville area man two days a week, he takes the general vicinity of Knoxville, is he the man who lives there?

A. He is in Knoxville all the time.

Q. You pay his meal expenses?

A. I am sure we do. He should put it on there. I assume he does. In fact, I know he does.

Q. The man who lives in Morristown, the man who lives in Knoxville, they lived at home at the time, and they make calls in their home towns, yet you pay their meal expenses?

A. If they are on duty and since we require that they eat at the same place, the customers requires them to call—they have to stagger their calls say, on a school cafeteria. You have certain periods you can call on those dieticians. When you approach the lunch hour you can't call on them too early, they have got things to do, to prepare the noon meal for the children—

[Tr. 32]

Q. You have to call on them early—

A. You can't call on them too early neither, as they approach lunch time, or too soon after lunch. They are cleaning up after lunch and it is absolutely restricted as to when you can call on them.

Q. Let's take, assume in talking about the school you talked about calling on too early in the morning, he would go some place and eat his breakfast somewhere and not eat the breakfast meal at home?

A. He certainly would. He couldn't get his wife up, I don't reckon. She would have to probably get up at four in the morning to prepare breakfast.

Q. Be pretty inconvenient to get up?

A. It would. I don't think she would want to.

Q. Thank you. Actually, just one more question on this, is it your policy to reimburse salesmen at least for the breakfast and dinner meals regardless of where they live or regardless of where they work?

A. If they are working for us on that particular day.

Q. Working for you on that particular day.

A. If it is for our convenience that they do it at a certain place and a certain time we do.

Q. When you hire a new man, when you are hiring a new man, in that particular period of time, did he know

[Tr. 33]

that his meal expenses were going to be paid when he came to work?

A. Well, if we employ anybody he understands that we pay his salary and expenses. I think that covers that, answers that question.

Q. Then he knew his meals, his breakfast and dinner expenses—

A. I assume he did if we agreed to pay his salary and expenses.

Q. You mentioned the maximum limits on any of your salesmen was 135 miles?

A. I think that is about 130 miles to Manchester, Kentucky and about the same to Coburn, Virginia.

Q. If my arithmetic is correct, the maximum round trip any of your salesmen would make would be 270 miles and not all of your salesmen do that?

A. No, sir, they don't all go that far; no.

Q. And some of your salesmen might go 50 or 60 miles and then return the same night?

A. That's right. Some live at Greeneville, which is 30 miles, 28.

Q. And if they go 30 miles and remain that night their meal expenses would be paid?

A. Certainly. The distance involved would not affect it, I don't think.

[Tr. 34]

Q. In the years 1960 and 1961, Mr. Correll did not spend overnight anytime during that period, did he?

A. As I recall he did not at that time.

Q. I beg your pardon?

A. I don't think he did at that time.

Q. Then he returned, he would leave his home, make his calls, eat his meals, pay for them out of his pocket and be reimbursed for them and he would return the very same night?

A. I am sure that is what he would do. I don't know where he was at night. I assume he was.

Testimony of W. C. Hale

Q. Do you know where Mr. Correll lives?

A. He lives on Fulton Road in Fountain City.

Q. Approximately how far is that from Morristown?

A. Well, you know, to get from Fountain Cty to Morristown is quite a circuitous route. About 40 miles to Knoxville. I guess about 45 or 46 miles.

Q. Then in effect when he eats his first breakfast meal, he could be possibly 75 miles away from Morristown, this is just an approximation?

A. He is further than that. He is out at Sweetwater.

* * * * * * *

[Tr. 35]

Q. Now, Mr. Hale, I would ask you this, do you tell your salesmen, did you tell Mr. Correll, I will put it, in the years 1960 and 1961 exactly the place to eat each time he ate one of the meals?

A. Let me explain it this way. I have done told you before but I will explain it again. I knew he was eating at John Doe's, and that is where he eats breakfast, and he eats lunch with another man over here.

I am not going to say you have always got to eat with this man right here at breakfast and for lunch, but I have got to know—you have got to eat somewhere so I can get in touch with you, and I also want you to eat with a customer, of course.

* * * * * * *

[Tr. 36]

Q. Now on Wednesday which place does he eat breakfast?

A. Well, if you ask me if he ate at the Central Cafe in 1960, I can't say that he did. I don't remember that, but he ate at a stipulated place.

Q. And I believe at 6:00 a.m., Central Cafe, Coffee Shoppe, S & C Lunch—those are the first three, and Mr.

Correll more or less had the option of these three places to eat at, didn't he?

A. Well, he wouldn't eat at the Service Grocery, that is not a restaurant.

Q. The first three.

A. He had the option to this extent, if he decided where he wanted to eat, I assume he decided to eat at that place because that is where the phone is shown, that is at this time. If he wants to change and lets me know and

[Tr. 37]

gives me the information so I can get in touch with him, it is all right.

Q. You don't require him to eat, have to eat at this particular place, you have to eat at this particular place?

A. Yes, I do. I don't recall where he was eating at then, but I do require him to use a certain place regularly.

Q. At a certain place?

A. Yes, that is correct.

* * * * * * *

[Tr. 40]

Redirect Examination

* * * * * * *

By the Court:

Q. Now you want to deal specifically with Mr. Homer Correll and the Hale Company, which is the only name that is involved with this jury in this trial.

Was he reimbursed during the period of time in question, namely, the years 1960 and 1961, for any meals that he ate at his home in Fountain City?

A. No, sir.

Q. Was he reimbursed for any meals during this period of time that he ate in Morristown?

A. No, sir, because he is never in Morristown, Judge, unless he just happens to come up for an infrequent

[Tr. 41]

visit.

* * * * * * *

[Tr. 42]

HOMER O. CORRELL, plaintiff, called as a witness by and in his own behalf, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Taylor:

Q. Would you state your name and address, please?

A. Homer O. Correll, Fulton Road, Fountain City.

Q. What is your occupation, Mr. Correll?

A. Salesman with Hale Brothers, Morristown.

Q. As a salesman with Hale Brothers what line of business are you in, what type products do you sell?

A. Wholesale fruit and vegetables and institutional

[Tr. 43]

canned goods and institutional frozen merchandise.

Q. How long have you been in this particular line of business?

A. 27 years this January.

Q. How long have you been with Hale Brothers?

A. Twelve and a half years. Will be thirteen years August 15th of this year.

* * * * * * *

Q. Mr. Correll, referring to your position with Hale Brothers, how are you compensated?

A. I am compensated with a salary, automobile furnished, and expenses.

Q. You say, "salary." During the years 1960 and

[Tr. 44]

1961, what was your salary?

A. My salary was $75.00 a week.

Q. Were you on straight—

A. Straight salary, $75.00 a week.

Q. Did you sales, the amount of your sales have any effect upon your salary?

A. No, sir. At that time it did not. No commission whatsoever.

Q. Referring to the expenses you mentioned, what type expenses do you incur in the course of your employment?

A. I incur meals, my breakfast and my lunch away from home which is required. My territory requires me to be away from home. It is required by the company that I work this territory.

I also incur automobile expenses, which I don't live in Morristown and I buy my gas here in Knoxville, and have my car serviced.

And I might take a customer out for lunch. Sometimes I do take a customer—call on him at lunchtime, take him out for lunch. That is a company expense also.

Q. Insofar as the payment for these expenses, who advances the funds for this?

A. Well, to begin with I use my own money, out of my own pocket for the company. At the end of the week I am reimbursed what I spent for my expenses.

[Tr. 45]

Q. What type of information do you report to your employer?

A. I make out a little pad, expense sheet, each day on my breakfast, also my lunch, or if I took anyone for lunch, lunch for two, and the amount of that lunch for both of us.

Q. And you accumulate this over a week?

A. Over a week at a time, and my gas tickets, I pay for my gas every week and I turn in my gas tickets also.

Q. How much do you receive from your employer for this?

Testimony of Homer O. Correll

A. The amount that I turn in, the amount that I spend.

Q. This particular accounting procedure through which you go to be reimbursed for your expenses, is this a policy of Hale Brothers which they follow ever since you have been there?

A. Yes, sir.

Q. What about your previous employers?

A. Ever since I have been on the road. It is the same procedure. All the companies I gave you, that was their procedure also.

Q. The same type of expenses?

A. Same type expenses.

Q. For the same items?

[Tr. 46]

A. Same items.

Q. Referring specifically to meals.

A. Meals, yes, sir. My expenses have always been paid for 27 years I have been on the road.

Q. Now then, Mr. Correll, in 1960 and 1961, and I refer you to plaintiff's Exhibit No. 2, I believe it is, would you briefly describe the territory which you covered in your occupation during those years?

A. Yes, sir. I worked this territory since I have been with Hale Brothers for the last twelve and a half years.

Etowah—well, start at Madisonville, Inglewood and Etowah; Athens, or starting at Sweetwater, right there is where it is, and Athens, Tennessee, that is Mondays and Thursdays I work that territory.

And on Tuesday and Wednesday and Saturday, I work, at that time I was working Lake City; Caryville, Jacksboro, LaFollette and Jellico.

Q. At that time on Tuesday, 1960 and 1961?

A. On Wednesday. Worked that on Wednesday.

Q. What area did you cover on Tuesday?

Testimony of Homer O. Correll

A. Maryville, Mascot, Straw Plains and Maryville, Walland, Townsend and Friendsville on Tuesday, at that time, 1960 and 1961.

* * * * * * *

[Tr. 47]

Q. Let's get a little more specific, say, referring to Monday, and starting with the time that you arrive and let's go through your work schedule for Monday.

A. Yes, sir.

Q. To be specific and pin it down for us in this particular case.

A. On Monday morning I arise at 4:30 a.m. About five o'clock I leave home. I meet Mr. Thompson. There are two salesmen in this Athens and Etowah territory, business requires it. I meet him at 5:15 or 5:20 at the Firestone place on Magnolia and Gay Street.

The Court: What town?

The Witness: About 5:20 a.m., Judge.

The Court: In what town?

[Tr. 48]

The Witness: In Knoxville.

A. (Continuing) We drive to Sweetwater, arrive in Sweetwater at approximately 6:15 or 6:20.

We go to Atkins Grill, we have our breakfast. I work this customer, a good customer of Hale Brothers, and I proceed then with my work for the morning in Sweetwater.

I usually get through around ten—between 10:00, 10:30, and then work Niota, go to Niota and work four customers.

From Niota I drive on to Athens and then there is approximately 12 or 15 customers in Athens that I work.

Q. Approximately what time on Monday do you arrive at Athens?

A. Approximately 11:00 to 11:30. Between 11:00 and 11:30.

Testimony of Homer O. Correll

Q. Approximately what time do you have lunch on Monday?

A. Around 2:00.

Q. Where do you eat lunch?

A. I eat at Newton's Cafe.

Q. You referred specifically to, I believe it was Atkins Grill and Newton's Cafe. Do you eat breakfast and lunch at these two places every Monday?

A. Yes, sir. I eat breakfast at Atkins Grill

[Tr. 49]

in Sweetwater on Mondays and lunch at Newton's.

Q. Why do you eat at these places on a regular basis?

A. Well, they are customers of Hale Brothers and I eat there—we eat at this particular place because Mr. Hale, if necessary to get in touch with me by telephone, as he stated in his statement, that it is necessary a lot of times that he get in touch with the salesmen on the road, so we usually eat at a specified place. If it is a customer we eat there at this place where it will be convenient where he can find us.

In other words, for price changes or any information regarding our merchandise for the shipment for next day.

I could go down to Sweetwater and if I find there was a price on oranges or apples, I might be higher, my competitor might be cheaper, and if I—if he knows that or knows where to find me at that particular time, that is the reason the schedule is made up, then I won't miss any business. Maybe I can meet this competitor with this price.

Q. How does Mr. Hale know that he can get you at these particular places?

A. We have a route sheet and he has a copy in his office on file. We keep a route sheet in our box.

* * * * * * *

[Tr. 50]

Q. Why is it necessary that he get in touch with you at these specific times as far as your schedule is concerned?

Testimony of Homer O. Correll

[Tr. 51]

A. Some merchandise, the type merchandise we sell is fast merchandise. The price might change, it might change twice a day.

This morning when we start out something might be fifteen dollars on an item and by noon it might be four dollars, and in order to give the customer the benefit of price and also to give him the service we are required to have the times, the approximate times that we will be at a certain point so Mr. Hale can call us and give us the price changes.

Q. Does the customer have anything to do with it as far as the time schedule is concerned?

A. A lot of customers do, yes. For instance, at the T.M.I. School, I have to see Mrs. Goodman at approximately eight o'clock of a morning. I have one grocery man on Monday I have to see at 12:00 o'clock noon, and a lot of schools. You can't go there during the lunch hours because, and restaurants, because they are eating at lunch time and you can't go during lunch hours because they are busy with their customers, so we have to arrange our schedule so we can work those for the convenience of the customer and also for the convenience of the company and myself.

* * * * * * *

[Tr. 52]

Q. I believe we got down to your having lunch on Monday in Athens. After lunch, approximately, let's go through your schedule that afternoon, Mr. Correll. What would be your schedule on Monday afternoon?

A. Well, Monday afternoon after I eat lunch, usually I work this one school at Ingleside, Ingleside School, and I come back to Sweetwater and work two customers

[Tr. 53]

there, and I am usually through about 4:00 p.m., in Sweetwater.

Q. Why didn't you work all of those customers in Sweetwater when you went down?

A. It isn't at their convenience. We can't work them in the morning. He will say, "You have to see me this afternoon. I dont' know what I am going to need this morning. I don't know what I am going to need, you will have to come back and see me this afternoon," and that is for the convenience of the customer.

Of course, I have competition and if I don't call on him my competitor will call on him.

In one place there are about three of us in there at one time, and they won't see you of a morning. That is one or two particular customers.

Q. What time on Monday afternoon do you normally complete your work schedule?

A. Usually around between three-thirty and four o'clock in Sweetwater.

Q. Approximately how far is this from your home?

A. Oh, approximately 50 miles. I believe it is 52 miles from my home to Atkins Grill. I have measured it several times.

Q. You return home every afternoon?

A. Yes, I return home every afternoon.

[Tr. 54]

Q. In 1960 and 1961, on your trip to your territory, Mr. Correll, what was the approximate mileage that you covered in the course of a day?

A. Approximately 150. It will vary a little bit if you have to go back and double back on a customer, but it will average between 150 and 175 miles a day.

Testimony of Homer O. Correll

Q. How did you travel in those years, Mr. Correll?

A. By automobile.

* * * * * * * *

[Tr. 55]

Q. Referring to the orders which you have taken, how are these orders filled?

A. They are filled by our warehouse crew in the evening as soon as they can get our orders in or we get our orders in, and they are filled by the warehouse crew of a night and they are delivered the next morning in my territory which is a long distance from Morristown.

My customers require, some of them, that they get their merchandise, say, in Athens, Tennessee, I have two customers in particular who want their merchandise between 7:00 and 7:30 Tuesday and Friday mornings.

So I get my ord s in to the warehouse as soon as possible and as soon as they are filled the truck leaves there at approximately 1:30 or 2:00 of a morning, next

[Tr. 56]

morning, and he delivers the orders—all orders taken today are delivered tomorrow.

Q. How do you get the orders to Hale Brothers?

A. On Mondays and Thursdays, Mr. Thompson, another salesman in this territory with me, Athens and Sweetwater, Mr. Thompson meets me at Mr. Shanks' grocery in Sweetwater about 3:30 or 4:00 o'clock in the evening, and he lives in Morristown so he takes my orders into Morristown, meets me at Shanks'. And on Thursday the same procedure. He meets me and he takes them on into Morristown and I come on in home.

Q. Does this completion of orders and delivery schedule, the service element involved, is this important to you?

A. It certainly is.

Q. In what respect?

A. Service is our business, quality merchandise and service. If we did not have that I would not have a job. We would be out of business.

Q. Does it have any relation to the route and schedule being followed?

A. Yes, it certainly does.

Q. In what respect?

A. Well, by getting the merchandise to the customer when he wants it. If you didn't, he will say, "My

[Tr. 57]

competitor, he can get it here," and so we have to give him service.

Q. Mr. Correll, I think we were referring to Monday, approximately how many customers do you call on in the course of Monday?

A. Approximately 30 customers.

Q. How many each week?

A. In a week, I have in my territory, over-all territory, approximately 100 customers.

Q. Does that mean 100 different calls in the course of a week?

A. Yes. I see all of them. I try to see all of those customers once a week.

Q. Do you see any of them more than once?

A. Yes, sir. I see some of them twice a week. One end of my territory I see them twice a week. Down at Athens and Etowah, in that territory, I see them all once a week and about five or six of those customers I see twice a week.

Q. I am backtracking here a moment, you testified that you ate breakfast on the road. Why is it necessary for you to eat breakfast on the road, why can't you eat at home?

A. Well, I had rather eat at home, be cheaper and probably better being in that early morning too, but it is required of me by the company that I am in this territory

Testimony of Homer O. Correll

[Tr. 58]

at this time of morning, and, in fact, I would have to be in this territory this time of a morning to give our customers service and also for the convenience of my company, to get the orders back in of an evening as soon as possible so they can be delivered early the next morning.

Q. Do you have an off day in this schedule?

A. I am off Fridays.

Q. Where do you have lunch and breakfast, your meals on that off day?

A. I eat at home on Friday.

Q. Does the employer pay for any of that expense?

A. He certainly does not.

Mr. Taylor: You may ask him.

Cross-examination

By Mr. Holmes:

Q. Mr. Correll, just to emphasize this for the jury, approximately how far do you live from Morristown itself?

A. Approximately 45—40 to 45 miles.

Q. Now we have been using Monday for an example and I guess you would call that a typical work day as far as travel is concerned?

A. Monday?

Q. Yes.

A. Yes, I would. You may use that.

[Tr. 59]

Q. Where did you say you ate dinner, in Sweetwater?

A. No. I eat dinner in Athens, Tennessee.

A. In Athens, Tennessee.

A. Yes, sir.

Q. Approximately how far is Athens from your home?

A. 65 miles.

Q. How far is Athens, approximately, from where Hale Brothers, Incorporated is located?

A. Approximately 105 to '10 miles.

Q. Now you eat breakfast farther from Hale Brothers in Morristown than you do breakfast, and what is that distance?

A. Yes. Approximately 20 miles south where I eat lunch than where I do breakfast.

Q. How far from Morristown do you eat lunch?

A. Eat lunch?

Q. Yes.

A. I guess Athens is 105 miles. I gave you that.

Q. Not breakfast. I am talking about dinner and I am trying to get the distance in the morning you are required to drive, you say 105 for breakfast?

A. No, I did not say 105. You asked me lunch first.

[Tr. 60]

Q. Yes.

A. Yes, my lunch is approximately 105 miles.

Q. From Morristown?

A. From Morristown. From Morristown Sweetwater is approximately 80 miles, 80 to 85 miles where I eat breakfast.

Q. O. K., thank you. Now I would just like to ask you one question about your reimbursements, and you stated that you ate breakfast on the road but you had rather eat breakfast at home because it would be cheaper.

A. Yes.

Q. You are reimbursed for your breakfast meal?

A. Yes, I am reimbursed for my breakfast.

Q. Actually then aren't you financial better off by being reimbursed for the meal you eat out than you would be if you were to eat at home?

A. No, I would say not because this is—

Q. In other words, I mean, the fact that if you were not reimbursed for meals, eating breakfast on the road, it would cost you more money?

A. I would still have to eat breakfast if I wasn't reimbursed for my meals.

* * * * * * *

[Tr. 67]

Q. Approximately what time do you return each day?

A. Oh, approximately, get in between 5:30 to 6:30 in the afternoon.

Q. In your deposition you said you got in approximately between 4:30 and 5:30?

A. That is on Monday. On Thursdays now, I am later, on Thursdays.

Q. But as a general rule—

A. A general rule it will average, during the week, say five o'clock. I would say around five o'clock, and on Thursdays, accordings to the weather condition.

Q. In the years 1960 and 1961 did you ever spend the night out, say overnight anywhere?

A. I don't remember if I did. I might have spent one night.

Q. To your knowledge you returned each day?

A. Yes.

Q. Mr. Correll, would you tell us where you went to on Tuesday in 1961, 1960?

A. In 1960 and 1961 I went to Maryville, Walland, Townsend and Friendsville and Mascot and Straw Plains.

* * * * * * *

[Tr. 68]

The Court: I am afraid the jury can't hear all the witness is saying. Please speak and look so that the jury can hear what you are saying.

A. (Continuing) On Tuesday I go to—at that time?

Q. At that time.

A. In 1960 and 1961 I went to Maryville, on to Town-

send and to Walland, and Friendsville, back to Mascot and Straw Plains and Four-Way Inn.

Q. Where did you say you went from Maryville?

A. Maryville, I don't know whether it is on this map or not. It is down in the country, schools.

Q. About how far is that?

A. It is about, Friendsville is approximately 15 miles south of Maryville, and Townsend is away up in the mountains, up above Kinzel Springs.

Q. What would you say is the farthest point in distance from home, say on a straight line, as the crow flies, that you go on Tuesday?

A. I would say approximately 55 miles.

Q. Approximately 55 miles?

A. Yes. In other words, on that day I usually drove more than I did in the Athens distance, running around. I drove approximately 180 to 185 miles.

* * * * * * *

[Tr. 70]

The Court: Anything further?

Mr. Taylor: No, the plaintiff rests.

The Court: Anything for the Government?

Mr. Holmes: No. At this time the Government rests and will the Court at this time entertain a motion?

The Court: Yes, sir. Let the jury step out temporarily.

(The jury was excused from the courtroom, and the following proceedings had in the absence of the jury.)

Mr. Holmes: At this time the Government would like to make a motion for a directed verdict.

The Court: Yes, sir, I will hear you.

Mr. Holmes: The directed verdict is explained here in this memorandum that I have given you, but specifically we ask for a motion on the ground that, first of all, the ex-

penses have to be included in the income and we have shown they are not meals in kind—they are reimbursements for the meals themselves; second, that the meals were not on the business premises of the employer as Mr. Correll was a distance from his employer's premises when he made his calls; and, third, that the particular meals were not for the convenience of the employer.

[Tr. 71]

We ask for a directed verdict on the ground that these particular deductions for these particular meals should not be deducted because of the ground that he was not away from home within the meaning of the statute and these particular expenses were personal.

The Court: Yes. Well, the Court recognizes that you have some support from some of the Court's to support your position on this motion; it also recognizes that there are cases which do not support your position, and from all of the evidence in this case the Court is of the opinion that the proof makes an issue for the jury.

* * * * * * * *

[Tr. 73]

AFTERNOON SESSION

(At 1:35 p.m., court reconvened pursuant to the noon recess and the following proceedings were had at the Bench between the Court and counsel out of hearing of the jury:

The Court: In support of the Court's action in overruling the motion to take the case away from the jury, see Hanson v. Commissioner, 8 C.A., January 16, 1952, 298 F. 2d 391; Williams v. Patterson, Director of Internal Revenue, 5 C.A., January 12, 1961, 286 F. 2d 333; Williams v. Patterson, District Director, 5 C.A., 286 F. 2d 333; Chandler v. Commissioner, 1 C.A., 226 F. 2d 467; U. S. Junior Chamber of Commerce v. U. S., Court of Claims, 334 F. 2d 660;

Magness v. Commissioner, 5 C.A., 247 F. 2d 740; S. S. Kresge v. U. S., June 4, 1963, 218 F. Supp., 240, U.S.D.C. E.D. Michigan.)

(The following proceedings were had in the presence of the jury.)

The Court: Gentlemen, you may proceed with your argument.

(Remarks of the Court off the record.)

(Counsel for the respective parties presented oral argument to the Court and jury, during the argument of counsel for plaintiff the following occurred:)

* * * * * * * *

[Tr. 75]

The Court: Members of the jury, this is an action by plaintiff Homer O. Correll and his wife, Dorothy Correll, to recover taxes which they claim were over-paid to the Government.

Mrs. Correll is what is known in the law as a technical party to the lawsuit. She is joined as a plaintiff simply because she signed the income tax returns along with her husband. So the real party to this lawsuit is Mr. Correll, the husband. He is the person who did the work for this company and he is the person who ate the meals and was reimbursed for the meals which are the subject of this lawsuit.

Now Mr. Correll says that he was a salesman for Hale Brothers Produce Company of Morristown, Tennessee; that he left his home in the performance of his duties early in the morning and traveled over a set route which has been described to you in one of the exhibits filed in this record and described by him orally; that this route, the round trip which he made during the week, during the five days of the week that he worked, covered approximately 150 miles or possibly more, even as high at 200, but that is a matter of proof and as a matter of fact to be determined by the jury

like all other facts; that he ate breakfast and lunch on the road and that he returned to his home each evening, and after returning to his home he submitted his orders to his employer

[Tr. 76]

for the delivery the next day; that he incurred traveling expenses in the course of his day's work; that among these expenses were his meals, breakfast and lunch—those are the only expenses that are involved in this lawsuit; that the amount that he paid for his breakfast and the amount that he paid for his lunch each working day and which he says he paid with his own funds but which he also says he accounted for to his employer and that his employer reimbursed him for these meals at the end of each week.

Now he says, or his lawyer says for him, that he is entitled to deduct these meals which were traveling expenses from his income under Section 119 of the Internal Revenue Code and under Section 162 of Title 26 of the Internal Revenue Code.

Now the Court instruets the jury that he cannot deduct these meals under Section 119 of Title 26 of this Code because that section provides, in pertinent part, that in order to deduct them as expenses and in order for them to be excluded from his income, that the meals would have had to have been furnished on the business premises of the employer.

Now these meals were not furnished on the premises of the employer because the premises of the employer are located in Morristown, Tennessee.

Secondly, that in the case of lodging, the employee is required to accept such lodging on the business premises

[Tr. 77]

of his employer as a condition of his employment.

Now, as indicated, these meals were not eaten on the premises of the employer and, therefore, in the opinion of

the Court, as a matter of law, he does not come within the purview of Section 119 of the Internal Revenue Code for the reasons indicated.

Now there is a question for the jury as to whether or not he comes within purview of Title 26, Section 162, of the Internal Revenue Code, and the Court will read pertinent parts of that section before this charge is finished.

Plaintiff says that the Commissioner has made an arbitrary classification or line of distinction that requires the person to stay away from home during a period of rest or overnight before these expenses of meals are deductible.

In that connection, briefly stated, the Commissioner says, in substance, that before you can deduct meals of this kind you must stay away from home at night.

Now the Court charges you that as a matter of law that is not written into the statutes that a person must stay away from home at night in order to get expenses of this character. It is true that the Commissioner has issued a regulation to that effect, and it is for you to determine under all the facts of this case whether or not that is an arbitrary regulation as applied to these plaintiffs under the facts in this case. Plaintiff says that these are de-

[Tr. 78]

ductible expenses incurred for the convenience of the employer under Section 119 or ordinary business expenses under Section 162.

Now up to this time the Court has tried to state briefly and as concisely as possible the contentions of the plaintiff in this case. Now if the Court has misstated any of these contentions or it has failed to cover them adequately or properly, do not let that prejudice the rights of plaintiff in this case or the rights of the Government.

Now the Court is about to follow the same pattern at this time in stating the contentions of the Government in the case, and also if the Court fails to state those conten-

tions properly or adequately do not let that failure prejudice these plaintiffs or the Government in this case.

The Government contends that these meal deductions should be included in income, and says that under Section 119 there shall be excluded from gross income only the value of any meals and lodgings furnished by an employer on the premises of the employer.

Now the Court has already ruled that Section 119 is out insofar as this jury is concerned.

The Government says that this has not been done and that it has not been furnished for the convenience of the employer; and that, under the regulations, to be deducted they have to be meals in kind rather than money paid to the

[Tr. 79]

taxpayer to buy the particular meals.

Now the Government says further that these are personal expenses and do not come under Section 162(a)(2) of the Internal Revenue Code because this statute applies to traveling the taxpayer does away from home. The Government says that this traveling of Mr. Correll was not done away from home, that it was done within the meaning of this statute at home and that Section 162 would be the only statute under which these meals could be deducted from his income.

Now in the opinion of the Court that is a correct statement of law, that this is the only statute that these meals can be deducted from income and it is a question for the jury whether or not under the facts in this case they can be deducted under this section, namely, Section 162 of the Internal Revenue Code.

Gross income means all income from whatever source derived, including compensation for service and similar items.

Colloquy Between the Court and Counsel

Section 162 provides, and the Court is about to read what it considers the pertinent part of this Section 162 which is involved, in the opinion of the Court, in this case.

"Trade or business expenses. In General.—There shall be allowed as a deduction all the ordinary and

[Tr. 80]

necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . . traveling expenses(including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business."

These are the key words, "while away from home in the pursuit of a trade or business."

In deciding the overriding issues, or the controlling issues in the case which the Court will state to you before this charge is concluded, the jury will have to answer the question whether or not the expenses incurred away from home, were the expenses for these meals necessary for the employee to properly perform the duties of his work, or were they expenses incurred for the personal benefit of the employee? Should he have eaten them at his home rather than eaten them away from home in order to properly carry on his business or to perform adequately his duties as an employee of this produce company—I have forgotten the name but that does not matter, it is the produce company in Morristown—Hale Brothers.

Now this is the issue for the jury to decide. Are these expenses—we are talking about the meals which were eaten by Mr. Correll away from home on his work days and that included the meal at breakfast and the lunch meal—are these (meaning expenses for meals away from the taxpayer's

[Tr. 81]

home, that is Mr. Correll) ordinary and necessary business expenses within the definition of Section 162, which the

Court just read to you? If they were, the jury should find in favor of the plaintiff; if they were not, the jury should find in favor of the defendant.

Taxpayer was employed as a traveling salesman in 1960 and 1961, by—these are the words that the Court lost—Hale Brothers, Inc., a wholesale produce and grocery company in Morristown, Tennessee. Taxpayer took orders five days a week in a territory assigned to him by his company, which necessitated his traveling between 75 and 150 miles round trip, depending upon the length of the daily assigned route. He left home in Knoxville, Tennessee, at approximately five a.m., drove in the direction of his route for over an hour and ate breakfast, or around an hour—that is a matter of proof or fact for the jury to determine—which usually lasted 45 minutes at a restaurant of his choice. Taxpayer then made calls on his company's customers until the noon hour when he ate his noon meal at a place of his choice. The noon meal usually took 45 minutes. Taxpayer then resumed his duties as a salesman, returning to the vicinity of his home at approximately 4:00 p.m. He gave the orders he took that day to another salesman of Hale Brothers who took them to the main office in Morristown.

Taxpayer paid for the two meals each day himself

[Tr. 82]

and submitted a report of the expense of his meals to his employer. His employer reimbursed him weekly for these expenses he had incurred. The Commissioner of Internal Revenue determined that the reimbursements should have been included as a part of taxpayer's income, and assessed an additional tax based upon the amounts of such reimbursements for 1960 and 1961. Taxpayer paid the assessment and filed a timely claim for a refund which was rejected.

And that is the reason of this suit, the rejection of this refund by the Commissioner.

It is the contention of the Government that the reimbursed expenses should be included in taxpayer's income for such years.

Taxpayer contends that the expenses were incurred as ordinary and necessary expense in carrying on the trade or business and should be excluded from his income.

You heard an explanation, a detail explanation of the taxpayer as well as the president or some official of Hale Brothers, Inc., as to the reasons why the taxpayer ate his breakfast at a certain place at a certain time and why he ate his lunch at a certain place at a certain time, why as claimed by the taxpayer that the schedule of taxpayer's work was a rigid schedule for the reasons which you heard the taxpayer give as well as his employer, Mr. Hale, as a representative of the Hale Brothers Produce Company.

[Tr. 83]

The pertinent part of Section 162 provides that there shall be allowed as deduction all the necessary and ordinary expenses paid and incurred during the taxable year in carrying out any trade or business, including traveling expenses and including the entire amount expended for meals and lodging while away from home in the pursuit of a trade or business.

You are instructed that the cost of meals while on one-day business trips away from home need not be incurred while on an overnight trip to be deductible, so long as the expense of such meals is incurred as an ordinary and necessary business expense by the plaintiff in carrying on the trade or business.

To determine whether or not the expense of meals incurred by the taxpayer is an ordinary and necessary business expense incurred in carrying on the trade or business, the terms "ordinary and necessary" generally mean whether

the expense proximately results from the carrying on the particular business involved and has some reasonable relation to that business.

* * * * * * *

[Tr. 85]

The Court: All right. Now gentlemen for the Government, Mr. Doster for the Government, do you have any objection to any part of the charge or any special request?

Mr. Doster: Yes. We would like to except to the Court's failure to direct a verdict. We believe that the Court has submitted essentially a question of law to the jury, that there are no facts or inferences to be drawn from the facts which are in

[Tr. 86]

dispute or evidence before the Court.

We would also like to object to the undue emphasis the Court placed on the so-called "overnight rule." We believe it had a tendency to make the jury believe that the Court was instructing them that he was in fact away from home when these expenses were incurred.

We feel this was further compounded when you instructed the jury that the plaintiffs were entitled to a deduction of ordinary and necessary business expenses without qualifying that by saying he must in fact be away from home when they were incurred.

The Court: All right. Call the jury back.

(The jury returned into open court, and the following proceedings had in the presence of the jury.

The Court: Members of the jury, in using certain language which is to be found in Section 162, Internal Revenue Code, particularly the phrase "away from home" or "at home," the Court has not intended to convey the idea to the jury that it has any views with respect to whether or not

these expenses were actually incurred by the taxpayer away from home within the meaning of Section 162.

The Court intended to say to you, and believes that it did say to you, that is a question solely for the jury, that is a question of fact which is the prerogative of the

[Tr. 87]

jury to decide, and if the Court has used language of that kind more than once in this charge, do not let that prejudice the rights of the Government or the taxpayer.

The Court has not intended to over-emphasize any of the language in Section 162 of the Code. The Court has done its best to give the jury in its own language and in the language of the respective parties, the theories of the respective parties in this case, and has tried to read from Section 162 what it considered the pertinent language that the jury should know in deciding the facts in this case and in reaching a verdict.

* * * * * * *

[Tr. 88]

Mr. Taylor: Yes, your Honor.

The Court: Mr. Foreman, have you reached your verdict?

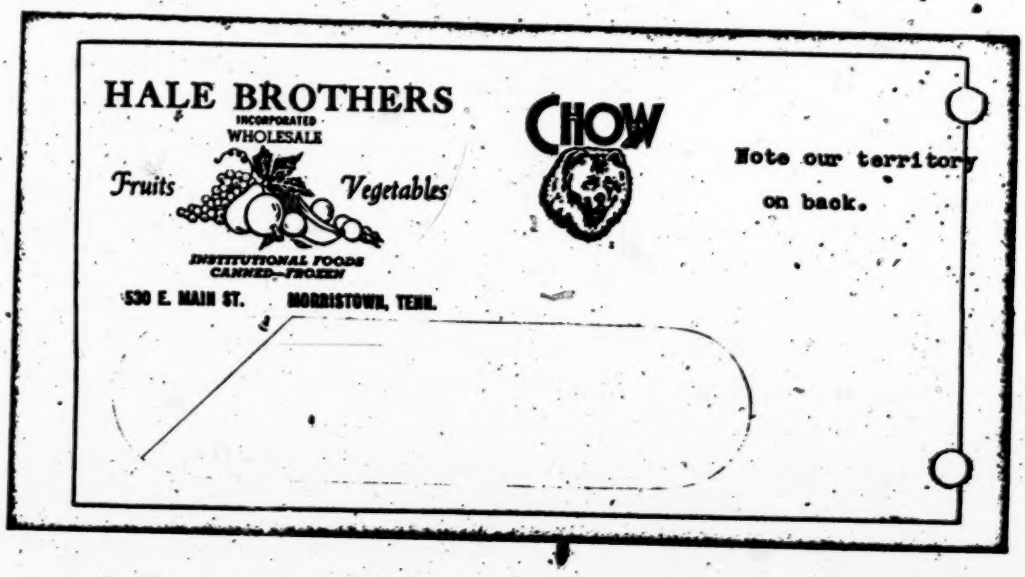
The Foreman: We have, your Honor. We find in favor of the plaintiff.

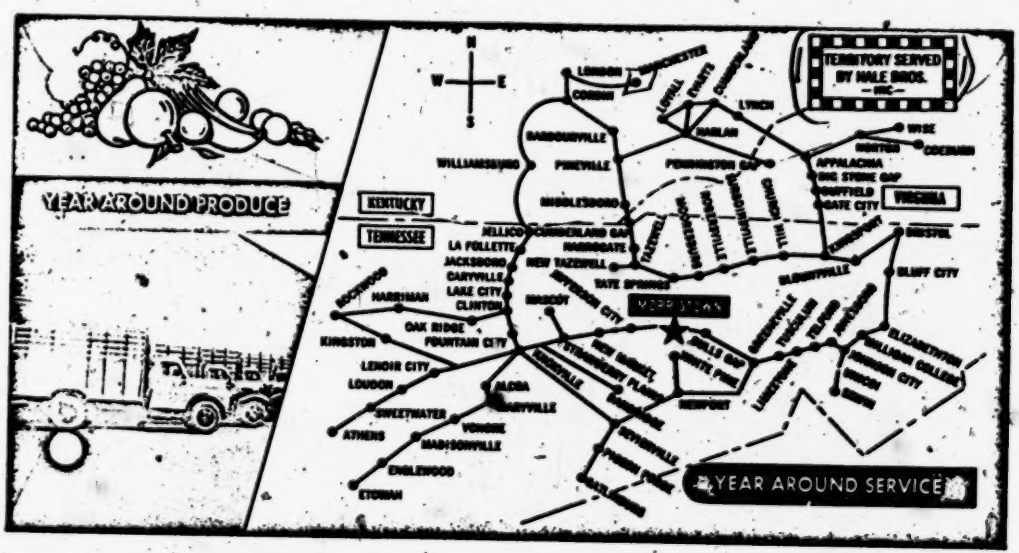
The Court: So say you all?

(The jury indicated in the affirmative.)

* * * * * * *

EXHIBIT No. 2


HALE BROTHERS
INCORPORATED
WHOLESALE
Fruits
Vegetables
INSTITUTIONAL FOODS
CANNED—FROZEN
530 E. MAIN ST. MORRISTOWN, TENN.
CHOW
Note our territory
on back.


YEAR AROUND PRODUCE
KENTUCKY
TENNESSEE
VIRGINIA
TERRITORY SERVED
BY HALE BROS.
INC
MORRISTOWN
YEAR AROUND SERVICE

In the

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 16,767

United States of America - - Defendant, Appellant

v.

Homer O. and Dorothy Correll - Plaintiff, Appellees

STIPULATION FOR JOINT APPENDIX

Pursuant to Rule 16(5) of the Court, it is hereby stipulated by and between counsel for the respective parties that the following materials shall constitute the contents of the joint appendix to be filed in this case, each party to bear the cost of printing the portion of the materials designated by him for printing in correspondence between the parties:

1. Docket Entries.
2. The Complaint, including the claims for refund and riders attached thereto.
3. Answer.
4. Pre-trial Order of January 21, 1964, as amended.
5. The Defendant's Motion for Directed Verdict.
6. The Defendant's Motion for Judgment Notwithstanding the Verdict.
7. The Order denying the Defendant's Motion for Judgment Notwithstanding the Verdict.
8. Judgment.
9. Notice of Appeal.

Stipulation

10. The following portions of the Transcript of Testimony:

Page	Lines
2	all
9	all
10	1–13
11	11–25
12	1–20 to word "Granted"
13	4–25
14–19	all
20	10–25
21	all
22	1–5
23	11–25
24	all
25	all
26	1–15
27	20–25
28	1–17, 23–25
29–31	all
32	1–25
33	all
34	1–22
35	13–25
36	10–25
37	1–10
40	1–7, 17–25
41	1
42	13–25
43	1–7, 21–25
44–45	all
46	1–24
47	12–25
48	all
49	1–24
50	23–25
51	1–22
52	19–25
53	all
54	1–8

Stipulation

Page	Lines
55	12–25
56	all
57	all
58	all
59	all
60	1–22
67	4–25
68	7–24
70	all
71	1–13
73	all
75–82	all
83	1–20
85	17–25
86	all
87	1–11
88	2–7

11. Exhibit No. 2.
12. This Stipulation.

(s) Richard M. Roberts
Acting Assistant Attorney General
Counsel for the Defendant-Appellant

(s) William L. Taylor, Jr.
Counsel for the Plaintiff-Appellees

September 15, 1965

[fol. 70]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16767

[File Endorsement Omitted]

HOMER O. CORRELL and DOROTHY CORRELL,
PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from United States District Court
for the Eastern District of Tennessee.

OPINION—Decided November 29, 1966

Before WEICK, Chief Judge, EDWARDS and PECK, Circuit Judges.

WEICK, Chief Judge. Taxpayer, Homer O. Correll, was a salesman, employed by a wholesale grocery company. He traveled by automobile daily to various cities in behalf of his employer, to make sales to restaurants, leaving his residence early in the morning and returning in the evening.

The question in this case is whether taxpayer may deduct the cost of his meals, for which he was reimbursed by his employer, as expenses incurred in the pursuit of his trade or business "while away from home" under Section 162(a)(2) of the Internal Revenue Code of 1954, 26 U.S.C. § 162(a)(2) (1958).

The Commissioner of Internal Revenue disallowed the deduction and assessed a deficiency. Taxpayer paid the

tax, applied for a refund, and upon its denial sued in the District Court to recover the amount of payment.

[fol. 71] The District Judge submitted the issues to a jury, which returned a verdict in favor of taxpayer, and judgment was entered on the verdict against the Government for the full amount of the refund, plus interest.

In its appeal, the Government contends that the District Court erred in not granting its motions for a directed verdict and for judgment notwithstanding the verdict. It is the position of the Government that the cost of meals was not deductible unless the duration of travel was so extensive as to require taxpayer to obtain sleep or rest. The Government concedes that if he had remained away from home overnight, he would have been entitled to the deduction for lodging and meals.

The facts were not in dispute. Taxpayer lived in Fountain City, Tennessee, which is a suburb of Knoxville. It is located about forty-five miles from Morristown, Tennessee, which was the location of the place of business of his employer. Taxpayer's territory included the cities of Madisonville, Engelwood, Etowah, Athens, Sweetwater, Lake City, Caryville, Jacksboro, LaFollette, and Jellico, all of which were located in eastern Tennessee. Taxpayer's employer required him to be in his territory at the beginning of the business day. To do so he had to arise at 4:30 o'clock A.M. in order to drive the necessary distance and to arrive in his territory at the required time. He was required to eat his breakfast and lunch at customers' restaurants, where his employer could reach him by telephone if necessary. He traveled from 150 to 175 miles each day, returning home about 5:30 o'clock P.M.

Taxpayer's employer reimbursed him for his expenses incurred for breakfasts and lunches. The Government contends that the amount of the reimbursement should be included in his income. It argues that no deduction for personal living expenses is allowed. 26 U.S.C. § 262 (1958). It states that most people engaged in business eat one or more meals away from home each day and are allowed no deduction therefor.

[fol. 72] The Commissioner has for many years applied the "overnight rule" as the test of deductibility of ex-

penses incurred for meals on business trips.[1] It was not until 1958, however, that regulations were adopted which mentioned for the first time the word *overnight*.[2]

The Tax Court has supported the Commissioner's view in a number of cases.[3] Other Courts have not.

The closest appellate case in point is *Hanson* v. *Commissioner*, 298 F.2d 391 (8th Cir. 1962). In that case the taxpayer was in the contracting business in Washington, Iowa. He was held to have the right to deduct the cost of his meals on business trips away from the area of Washington, even though he returned home on the same day. The Court construed the plain language of the statute to mean what it says and held that the Commissioner could not amend it by the insertion of the words "over night."

The Eighth Circuit adhered to the same rule in *United States* v. *Morelan*, 356 F.2d 199, 208-210 (1965). Other cases which have disapproved the overnight test are: *Williams* v. *Patterson*, 286 F.2d 333 (5th Cir. 1961) (expenses incurred by railroad conductor during layover); *Chandler* v. *Commissioner*, 226 F.2d 467 (1st Cir. 1955) (travel expenses); *Scott* v. *Kelm*, 110 F.Supp. 819 (D.C. Minn. 1953) (automobile and travel expenses).

The theory of Section 162(a) is that the added cost of meals away from home is related to the pursuit of the taxpayer's business and thus should be deductible as an [fol. 73] expense incurred in producing income. The Commissioner's "overnight" or "sleep or rest" rules bear no

---

[1] 4A Mertens, Law of Federal Income Taxation, p. 345.

[2] Reg. §§ 1.162-17(b)(3)(ii), 1.162-17(b)(4) and 1.162-17(c)(2).

[3] *Mortrud* v. *Commissioner*, 44 T.C. 208 (1965); *Armstrong* v. *Commissioner*, 43 T.C. 733 (1965); *Smith* v. *Commissioner*, 33 T.C. 861 (1960); *Winn* v. *Commissioner*, 32 T.C. 220 (1959); *Herrin* v. *Commissioner*, 28 T.C. 1303 (1957); *Osteen* v. *Commissioner*, 14 T.C. 1261 (1950). However, in *Bagley* v. *Commissioner*, 46 T.C. 176 (1966) the Tax Court reconsidered its prior decisions and allowed a deduction for expense of meals incurred on business trips which did not last overnight. In stating that it would no longer apply the overnight rule in all situations the Tax Court, relying on *Hanson* v. *Commissioner*, 298 F.2d 391 (8th Cir. 1962), decided to view each case in the future on its own facts.

rational relation to the business necessity of the meal expense. Rather, they use a time element in testing deductibility. In an era of supersonic travel, the time factor is hardly relevant to the question of whether or not travel and meal expenses are related to the taxpayer's business and cannot be the basis of a valid regulation under the present statute. While the rule adopted by Appellate Courts may not always work satisfactorily, we believe that the remedy lies with Congress and not with the judiciary.

Under our ruling, the trial court could have directed a verdict in favor of the plaintiffs. It was not error for him to deny the Government's motions for a directed verdict and for judgment notwithstanding the verdict.

Affirmed.

[fol. 74]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16,767

[File Endorsement Omitted]

HOMER O. CORRELL and DOROTHY CORRELL,
PLAINTIFFS-APPELLEES

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

BEFORE: WEICK, Chief Judge, EDWARDS and PECK, Circuit Judges.

JUDGMENT—Filed November 29, 1966

APPEAL from the United States District Court for the Eastern District of Tennessee

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

[fol. 75]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 76]

SUPREME COURT OF THE UNITED STATES

No. 1334, October Term, 1966

UNITED STATES, PETITIONER

v.

HOMER O. CORRELL, ET UX

ORDER ALLOWING CERTIORARI—June 12, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 267988 1015